not concerned with the part alleged to be played by them or the effect on the appointment, if the allegations were proved. We are only concerned with the order that was made.

This order was predicated on the views taken by the Co-operative on facts and figures, such as they were, submitted by the managers. It took the average production per acre at the relevant stage of growth and the average price per ton. It also allowed 50% of the proceeds of sale for the expenditure incurred in the production and it also took into account the capital expenditure claimed by the managers. On an area of 2,300 acres for the period from September 1974 to August 1975, and thereafter on an area of 2,500 acres, it calculated that the net income for this period was $2,420,466. But if the expenditure was not half the proceeds but somewhat less, as would appear to be claimed by the managers in their summaries of their accounts, then the money in their hands would be $2,854,310. Alternatively, taking Tunku Mansur Yaacob's figures of net income and deducting from this net income the captial expenditure as claimed by the managers, it worked out a figure of $2,432,500 as being with the managers. Finally, on the basis of an acreage of 1,500 as being under production from September 1974 (compare the figure of 1,599 arrived at by Mr. Leach after an attempt at reconciliation with production), and the other factors, the Co-operative demonstrated that the net income would be $1,376,300. This was the view most favourable to the managers and quite obviously, the judge accepted this as being reasonably accurate and clearly based on the figures supplied by the managers. He therefore made the order that the managers pay the sum of $1,000,000 into court. If he erred at all, he would appear to have erred on the side of the managers.

The managers' appeal was almost entirely directed to this part of the order and the consequences that would follow from their failure to comply therewith. As we heard their counsel, they did not resist the order to make the monthly payment of $50,000. At the hearing in the High Court, they did not produce the best evidence available. They produced uncorroborated abstracts of accounts which did not tally with the reasonable deductions to be drawn from the facts and figures given by their visiting agents. And, when it came to the crunch, they said, completely forgetting that they had charge of the accounts and the money: You must first establish your right and then we will pay, but only what you can establish as being in our possession. Until and unless you can point your finger to the exact amount, we are under no obligation whatsoever to pay money at all.

Perhaps, it is only reasonable to infer that there is no money in their banking accounts. Certainly not a million dollars. But foolish virgins have been known to burn and waste away the oil which their wiser sisters saved. And if at the proper time, they could not produce the goods, they must face the consequences, more so if they have to render an accounting afterwards.

We trust the right of the Co-operative to the net profits from the oil palm plantation is not a matter of dispute. Nor the inherent duty of the courts to do justice.

As for the alleged onus on the Co-operative to identify with certainty the money in the hands of the managers, Sir George Jessel M.R. in *London Syndicate* v. *Lord*[1] at pages 88-89 said that all that was required was whether under the circumstances it had been sufficiently ascertained, there was a sufficient probability that the account would result in the balance of the amount at least being due by the defendant to the plaintiff.

In *Wanklyn* v. *Wilson*,[2] a case of an interlocutory application for the payment of money into court made before the trial of an action for the taking of the account, Stirling J. concluded at page 185, after a review of the relevant cases that

> "Upon these authorities it seems to me that the court is now at liberty, when it has before it the parties to an account, to look at the account and the facts of the case, and, to use the words of the late Master of the Rolls, 'in the fair exercise of its judicial discretion', to order a sum of money to be paid into court when it has been sufficiently ascertained that such a sum will be due on the taking of the account. Adopting that principle, I have to look at the facts of this case, and in the fair exercise of my judicial discretion I have to consider whether I can arrive at any conclusion as to what sum will be due to the plaintiff in the taking of the account which is the object of the action, having regard to the account which has been actually rendered by the defendant in the action; and I am also to bear in mind that the object of the whole proceeding is, again quoting the words of the late Master of the Rolls (8 Ch.D. 90), 'to secure the fruits of that litigation to the successful party, and nothing can more conduce to attaining that object than taking security from the person who must ultimately pay at least the amount for which security is given'."

In our view and with respect, the High Court had, in the circumstances of this case, jurisdiction to make the order and had exercised its jurisdiction properly in making the order. For these reasons, the appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *Rithaudeen & Aziz; Allen & Gledhill.*

K.C. LIM & ASSOCIATES SDN. v. PEMBENAAN UDARAMA SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) November 5, 1979 & January 8, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 128 of 1979]

Practice and Procedure — Claim by architect for fees — Project abandoned by developer — Whether costs of construction grossly underestimated — Application for summary judgment — No triable issue — R.S.C. 1957, O. 14.

Architects — Fees — Agreement for fees — Project abandoned — Whether costs of construction grossly underestimated — Implied condition.

Contract — Architect — Agreement for fees — Negligence or want of skill — Implied term.

In this case the appellants were instructed to prepare a preliminary design and to provide a feasibility study report and cost plans for a multi-purpose shopping and commercial complex and high-rise residential flats for the respondents. The appellants employed a firm of Chartered Surveyors to provide the feasibility study. Plans were then submitted by the appellants to the City Council. Subsequently the respondents informed the appellants that they had decided to abandon their project after a reappraisal of the feasibility and viability of the project. The appellants thereupon sued under the contract of appointment for the fees for the stages they had completed in accordance with the contract, amounting to a total of $1,682, 216.16. The defence raised by the

respondents was that the architects by their surveyors had grossly under-estimated the costs of construction. In support they relied on a report by another firm of surveyors. They also counterclaimed for damages for negligence on the part of the architects and the surveyors. The appellants applied for summary judgment under Order 14 but the learned judge held that the defence was not a sham and he refused the application. The appellants appealed.

Held: (1) the only issue raised by the respondents was whether the appellants by their surveyors had grossly under-estimated the costs of construction. The question was whether the respondents have raised this issue of fact in such manner that on well-established principles in an Order 14 application they would be entitled to defend the claim unconditionally;

(2) in this case the respondents had not proved negligence or want of skill on the part of the appellants which resulted in a gross-underestimation of the costs. They relied only on the opinion of another firm of surveyors and this was not sufficient in all the circumstances of this case to disclose such facts as to raise a triable issue or show a defence on the merits;

(3) the appellants should therefore be given leave to sign final judgment against the respondents with costs but in view of the counterclaim for damages, the judgment sum should be deposited in court to await the outcome of the counterclaim.

Cases referred to:-

(1) *Duncan* v. *Blundell* (1820) 3 Stark 6; 171 E.R. 749.
(2) *Flanagan* v. *Mate* (1876) 2 Vict. L.R. (Law) 157.
(3) *Nelson* v. *Spooner* (1861) 2 F. & F. 613; 175 E.R. 1209.
(4) *Moneypenny* v. *Hartland & Ors.* 1 Car. & P. 351; 171 E.R. 1227.
(5) *Thomas* v. *Hammersmith B.C.* [1938] 3 All E.R. 203.

FEDERAL COURT.

C. Abraham for the appellants.

Raja Abdul Aziz bin Raja Addruse for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): By a specially endorsed writ issued on May 13, 1977 the plaintiffs, an incorporated company carrying on business as chartered architects (the architects) sued the defendants for the considerable sum of $1,682,216.16 for professional services, spelled out in the relevant paragraphs of the statement of claim endorsed on the writ to be for "attending meetings, preparing drawings and plans, preparing feasibility study and cost plans, making applications and communications with the Dewan Bandaraya (the City Council of Kuala Lumpur) and other authorities, preparing an architectural scale model and photographs of the project and generally carrying out the defendants' instructions." The architects also claimed interest and costs.

The defendants are another incorporated company and the owner of a piece of land which they desired to develop into a multi-purpose shopping and commercial complex and high-rise residential flats. The project obviously involved millions of dollars. We shall hereafter refer to the defendants as the developers.

Quite reasonably, before embarking on the project, they would require to know whether the project was feasible and for that purpose they instructed the architects to prepare a preliminary design and to provide a feasibility study report and cost plans. The architects did prepare a design but since they were not surveyors or cost consultants, they engaged Yong dan Mohamed Faiz Sdn. (the surveyors) a firm of chartered surveyors to provide the feasibility study.

Basing their study on the architects' design, the surveyors submitted on August 27, 1973, a Preliminary Estimate Cost Plan and Economic Feasibility Study. The surveyors furnished other reports, some of them consequent upon the changes in the plans required by the developers. They were, in chronological order, a Project Profit Returns dated October 14, 1974, a Report on Scheme No. 2 dated November 1, 1974, a Projected Profit Returns dated November 7, 1974, a Revised Feasibility Study dated November 1974 and an Economic Feasibility Study dated December 1975.

As will be seen, the surveyors were put to preparing 4 reports in the course of about 5 weeks from mid-October to late November in 1974. Before the second study, the developers had by letter dated September 1974 indicated to the architects their intention to appoint them their architects for the project. After the flurry of activity by the surveyors in 1974, the architects' appointment was formalised in an agreement in writing. The agreement was executed on June 12, 1975.

Consequent on this appointment, the architects were instructed by the developers to submit to the City Council final building sketch plans and detailed working drawings, which they did on July 2, 1975. The developers next desired to increase the floor area. The architects then had to revise the plans and resubmit them, and the surveyors furnished the last of their studies.

The developers made two public announcements of their project in the newspapers. On March 28, 1975, they publicised the project as costing them about $40 millions. On June 3, 1976, they said that the cost of the project had now been increased to between $60-$70 millions. So far, they did not give the impression that they were worried about their ability to find the capital for the project, but it is to be borne in mind that part of the construction costs would come from the deposits and progress payments to be obtained from the expected buyers of the shop premises, offices and residential flats comprised in the construction. What they required to be assured of, entirely understandably, was the profitability of the project and naturally they relied and they must be taken to rely heavily, if not, entirely on the judgment of experts engaged to provide facts and figures for that purpose. The surveyors provided not only the costs of the construction and the projected amounts to be realised from the sales but also a cash flow chart to assist the developers to work out how much money they would have to find and how much they could obtain from the purchasers at various stages of the construction.

Then with dramatic suddenness, the developers notified the architects of the abandonment of the project by letter dated August 9, 1976. They gave their reasons in a letter of October 6, 1976. Reference will be made later to these reasons.

To understand the particularisation of the architects' claim for their fees in the writ, it is now necessary to turn to the contract of appointment.

Clause 2 defines the scope of the duties and services of the architects in these terms:

"2. The Architect shall take the instructions from the Client or his authorised executive officers and prepare all necessary sketch designs, provide approximate estimate of costs, submitting all applications for the building and other licences, bye-laws and other approvals, via the Client's appointed agent, preparing all architectural, co-ordinating structural and services working drawings, preparing specifications and Bill of Quantities and all such other particulars as may be necessary for the preparation of bills of quantities for the purpose of obtaining tender/s, examining and advising on tender/s and the preparation of contract documents, preparing for the use of Contractors; two (2) copies of all drawings, specification and other particulars of such further details as are necessary for the proper completion of the Project."

No quarrel subsists between the parties over this clause.

The scale of fees is set out in clause 9. It is at the rate of 7¾% of the total costs of the executed works. The payment is however to be in stages for easy payment and so as to provide for abandonment, deferment, substitution or omission of the projects or works or part thereof. The provision for the mode and time for payment for the fees and partial services is in clause 10. The following are the relevant parts:

(A) *Preliminary Design Stage*

10.1 For taking client's instructions and preparing preliminary sketch designs to illustrate possibilities of a site or cost of a scheme the fee shall be on quantum meruit.

10.2 For taking client's instructions, preparing sketch designs sufficient to indicate the architect's interpretation of the client's instructions, and preparing preliminary drawings and particulars sufficient to enable applications to be made for planning approval, and for "in principle" approval in connection with any specific by-law, the fee shall be one-third of the appropriate percentage due on the estimated cost of such works.

(B) *Building By-Law Application Stage*

10.3 For taking client's instructions, preparing sketch designs, making approximate estimates of cost by cubic measurement or otherwise and preparing sufficient drawings for the purpose of submitting to the appropriate authority to obtain building approval, the fee shall be one-half of the appropriate percentage due on the estimated cost of such works.

(C) *Preparation of Tender Stage*

10.4 For taking client's instructions, preparing sketch designs, making approximate estimate of cost by cubic measurement or otherwise, and preparing working drawings, specification, or such other particulars as may be necessary for the preparation of bills of quantities by a nominated quantity surveyor, or for the purpose of obtaining tenders, the fee shall be two thirds of the appropriate percentage due on the estimated cost of such works.

(D) *Supervision Stage*

(This is not relevant and it is therefore not reproduced).

It is common to both parties that the architects had completed stages (A) and (B) and therefore they were, *prima facie*, entitled at this stage to one-half of 7¾% of the surveyors' cost estimated dated December 1975 of $43,468,000 whether the project was carried on or abandoned. Their bill therefore was for $1,682,216.16. There were 2 other minor items which the developers accepted and paid. With these the court is not concerned.

It may be convenient here to note that the surveyors' original estimate of the costs of construction in August 1973 was $30,283,000 and in November 1974 $40,634,300. The additional cost was said to be due to an increase in the floor area, increased costs due to inflation and of building materials and labour and delay in implementing the project by the developers. The surveyors' report for December 1975 gave a further enhanced figure of $43,468,000.

We accept as common knowledge to be taken judicial notice of that from 1973, following the Arab embargo on oil production and the consequent decision to raise the ceilings on the price of oil, inflation set in in Malaysia as well as in the rest of the world. There is, in our view, considerable support for the architects' contention that part of the increased costs was at least due to the rises in the prices of materials. In our view, too, this consideration is not without significance in the turn of events in the subsequent history of this project.

To return to this history: as noted, the developers gave their reasons for abandoning their project in their letter of October 5, 1976. This letter therefore needs to be cited in full:

"Pembenaan Udarama Sdn. Bhd.

5th October, 1976.

K. C. Lim Associates Sdn.,
Chartered Architect,
8 & 10 Jalan Telawi,
Bangsar Baru,
Kuala Lumpur.

For the Kind Attention of Mr. K. C. Lim

Dear Sir,

PROPOSED COMMERCIAL & RESIDENTIAL COMPLEX ON LOTS 96-98 & 230, SECTION 46, OFF JALAN IPOH, KUALA LUMPUR FOR PEMBENAAN UDARAMA SDN. BHD.

We wish to inform you that the Board of Directors have decided to abandon totally the above project. The decision was arrived at after a reappraisal of the feasibility and viability of the said project in the light of current trends and developments in the property and construction market.

In view of this and in order to clear our outstanding accounts, you are kindly requested to submit your charges for the complete settlement of the professional fees due in respect of the said abandoned project as soon as possible.

Yours faithfully,
PEMBENAAN UDARAMA SDN. BHD.

?

CHOO CHING HWA, JP; PPN; PJK.
Managing Director."

It is to be observed that the reason why the project was abandoned was not the default of the surveyors, for whose action the architects as their employers were liable, in grossly under-estimating the costs of the project. The reason was an apprehension that the project was not viable or profitable after a

reappraisal in the light of current trends and developments of the property and construction market. However vaguely stated the given reason might be, it expressly excluded the architects from liability for the abandonment. Hence their request for a note of the architects' charges. But, though vague, the reason is discernible. In plain English, it is that having regard to the condition of the property and construction market at the time of this reappraisal, they believed they would not be able to find sufficient buyers for the offices and apartments at the prices asked for to make the operation a financial success. It ought to be realised that throughout the word feasibility had been used to mean viability in its extended meaning of profitability and where profitability is concerned, the question of providing the capital is only important where the developers have limited funds or have not the ability to obtain the difference between the costs and the deposits reasonably to be derived from the expected purchasers. The developers who are a conglomerate of a government-sponsored organisation, the U.D.A. and a commercial concern, do not appear to be handicapped by lack of capital. At least, they have never claimed to be. And perhaps for this reason, they had never given the architects a ceiling for the construction. If so, their profitability depends not so much on providing the costs of the construction as on their ability to sell at prices that would exceed the constructional and other incidental costs. And selling is in their department, not the architects' or the surveyors'. The question whether their building would sell is a matter entirely for them. And quite clearly their letter said that in their considered view they would in the conditions prevailing in October 1976 not be able to find the market for their construction. In this letter they did not blame the architects for their surveyors' estimates.

Neither did they in an interview their representatives had with the architects on October 31, 1976 for the purpose of settling the latter's fees. A minute exists of what transpired at this interview. It was prepared by the developers' team. The purpose of the meeting was to seek a reduction of the fees. $1.6 million odd was too much. The developers offered $539,002.40 in full settlement. We had not have it worked out how this figure was arrived at but it obviously was a fraction of the fees submitted and payable up to March 1975. What however is of considerable interest in this minute is not the admission of liability therein but the offer to the architects and his team to continue as consultants for an alternative project. Was the truth then that the developers now had another idea for the development of the land?

Be that as it may, when they came to resist the architects' Order 14 application for summary judgment, the developers relied entirely on an allegation of gross under-estimation of the construction costs. In support of their contention they produced a report by another firm of surveyors, Kumpulan Ukur Bahan. The date of this report was strangely not given but it is admitted that it was prepared specially for argument in the Order 14 application. It was not available to the developers when they decided to abandon the project. What it said was that the various estimates of costs by the architects' surveyors were inaccurate and too low and the result would have been a loss of several millions of dollars. But this task was clearly a different one from that hitherto taken by the developers.

The learned judge who heard the application for summary judgment reviewed in a very general manner the pleadings including the developers' counterclaim against the architects and the several affidavits filed and he came to the conclusion that issues both of law and of fact arose, to quote, "the main ones being whether the cost of the project was grossly underestimated in the feasibility reports, etc., furnished by the plaintiff to the defendant; if there was such gross underestimate, whether the plaintiff was negligent in giving such underestimate; if the plaintiff was negligent, whether it is too late now for the defendant to reject the plaintiff's works; and if the plaintiff is liable for negligence, what was the extent of the plaintiff's works that the defendant is entitled to reject."

With respect, we are of the opinion that the only issue raised by the developers is whether the architects by their surveyors have grossly under-estimated the costs of construction. That is a question of fact. The issue of law is whether the developers have raised this issue of fact in such a manner that on well-established principles in an Order 14 application they would be entitled to defend the claim unconditionally. There is possibly another issue of law which is whether having regard to the counterclaim of the developers against the architects and others, the claim of the architects should be determined only as a set-off against the counterclaim.

On the issue of fact, the judge did not consider the defence a sham which the architects said it was. He did not however allude to the averments in any detail, nor did he in particular refer to and consider the termination of the contract and the admissions in the letter of termination and in the minute of the subsequent interview, or the other circumstances of the case as disclosed in the several affidavits and exhibits thereto annexed.

It is accepted by the plaintiff as settled law that where a party undertakes a work of skill and labour and fails in his object so that his employer derives no benefit from the work, he is not entitled to recover anything: *Duncan* v. *Blundell.*[1] So an architect is not entitled to be paid for the work he has done if the lowest tender received is grossly in excess of the budget he is given for the project: *Flannagan* v. *Mate;*[2] *Nelson* v. *Spooner.*[3] In *Moneypenny* v. *Hartland & Anor.*,[4] an engineer was employed by a committee to erect a bridge and build a road to it, and to make an estimate of the expenses of the work. On the question whether he was entitled to any compensation when the actual cost of the construction exceeded his estimates because his failure to ascertain the nature of the soil necessitated piling for the foundations of the bridge which had not entered into his calculation, Best C.J. expressed the general rule to be in these words:

"Supposing negligence or want of skill to be sufficiently made out, unless that negligence or want of skill has been to the extent that has rendered the work useless to the defendants, they must pay him and seek their remedy in a cross-action."

But where he delivers in an estimate greatly below the

sum at which a work can be done, and thereby induces his employer to undertake what he would not otherwise do, then he is not entitled to recover.

In the absence of an express term, it is a question whether, in all the circumstances, it is an implied condition of the architects' employment that the works should be capable of being erected at or reasonably near the estimated cost. When there is such an implied condition and the tenders are too high, the employer must act reasonably to mitigate his loss as far as possible. Thus it may be that the employer can substantially achieve his desired object despite reductions in the work to be done. In such a case, it seems that he should give the architect the opportunity of altering his plans so as to effect the reductions: Building Contracts by D. Keating (4th Edn.) at pages 220-221.

The case under appeal is not one in which the architect had been given a ceiling. It is then a question of whether there was this implied term.

The evidence as to this is in the press release on June 3, 1976 when the developer announced the cost at between $60-$70 millions. The latest estimate of the surveyors was $43,468,000 in December 1975. Since the press release was more than a year after they had definitely instructed the architects to submit the final plans to the City Council, the developers could have accepted the estimate and added to it such increases as were reasonably to be due to the resulting delay, and come to this figure of $60 millions and more but whether this was the only reason or there were other reasons, they must reasonably and inferentially be taken to have indicated a readiness to commit themselves to the extent of their press release and to have thereby refuted any contention of an implied term. Further support for this inference lies in the absence of any reasonable attempt given by the developers to the architects by reductions in the work to be done to achieve the project desired by them, and in their insistence at all stages on profitability and not building within a certain limit.

We now turn to consider whether there was such evidence before the court of a gross under-estimation of the costs as to entitle the developers to resist the Order 14 application and to defend unconditionally. The evidence of a tender exercise would have established this beyond argument. But this "acid test" was not taken. The developers terminated the employment of the architects without instructing them to proceed to stage (C) in clause 10 of the Agreement of Employment and call for tenders. If they had only called for tenders and could put it to the architects themselves that since the lowest tender received was so grossly in excess of their estimates of the costs that they were not prepared to carry on with the construction, we doubt very much if they would have been faced with any demand for fees, full or partial, or with this action. But they did not and that evidence which is the best evidence available, is not before the court. What is before the court was the reason they gave in their letter for the termination of the contract. It was not the question of excess.

What the developers did next was to negotiate with the architects for a reduction of their contract charges and when the latter proved adamant and would not reduce their full fees, and confronted them with a writ, to shop around for an excuse. They found this in the scrutiny of Kumpulan Ukur Bahan of the surveyors' estimates and the conclusion that the several calculations of costs had been greatly under-estimated. And entirely on this conclusion they now based their defence and their resistance to this application.

In the absence of any expert advice and cross-examination on the various estimates by the surveyors and Kumpulan Ukur Bahan, we do not feel confident that we can go into them and come to a finding for ourselves at this stage whether the criticism of Kumpulan Ukur Bahan was correct. In fact the only question for us is to consider whether it was sufficient to raise a triable issue that the architects were not entitled to be paid, in other words, whether negligence or want of skill on the part of the architects has been sufficiently made out and had resulted in a gross under-estimation of the costs.

Without the contention of Kumpulan Ukur Bahan, such gross under-estimation has certainly not been made out. If so, in the words of Best C.J. quoted earlier, the developers must pay the architects and seek their remedy in a cross-action. The next question then is whether this contention of Kumpulan Ukur Bahan can be said to have raised the question of gross under-estimation even for the purpose of resisting an Order 14 application. But consider, it is no more than the opinion of one expert as opposed to that of another. Consider too, it was made for the very purpose of resisting this application. Consider next the developers never had it nor relied on it when without apparent cause other than their own volition, they terminated the agreement: see *Thomas* v. *Hammersmith B.C.*[5] Consider, too, the developers had shown a willingness to pay their architects their fees but at a reduced rate. In these circumstances we consider that the proper view is to hold that the opinion of Kumpulan Ukur Bahan was not sufficient in all the circumstances of this case to disclose such facts as to raise a triable issue or show a defence on the merits. If an opinion can do this, Order 14 would be even less efficacious than it already is. An opinion is something entirely different from an averment of a fact. While it is appreciated that an allegation of a fact may not be true in the light of the evidence to be led at the trial, and yet be sufficient, if of relevance, to enable the court to grant leave to defend either with conditions or unconditionally, an opinion is a different thing altogether. For ourselves, we cannot see how an opinion can be equated to an averment of a fact.

With respect, therefore, we disagree with the learned judge. We believe he would not have come to his decision if he had but considered the matter in some detail. We therefore allow the appeal with costs. In our view, the proper order on the evidence before the court, is that the plaintiff be given leave to sign final judgment against the developers with costs. Having regard to the size of this sum, and the further order we are making, we propose the order that a Banker's guarantee would be sufficient compliance with this order.

At the hearing, our attention was drawn to the unrefuted revelation made at the Bar that in defiance of the ethics and code of conduct of the profession, and without giving an assurance that the fees of the architects would be safeguarded, another firm of architects had, on the instructions of the developers, submitted plans for the development of the land, the new development is now approaching a completion, and when it is completed and the several parts of the complex sold, there would be nothing left which the architects could attach for any judgment they might obtain, since the developers were a one-project concern. We do not think this a matter of relevance.

We would conclude by making it clear that, if necessary, by suitable amendments, the developers might pursue, if they were so advised, their claim for such damages as flow from any negligence they could prove on the part of the architects. For that reason, Mr. Cecil Abraham for the architects, had himself suggested that the judgment sum be deposited in court to await the outcome of the developers' counterclaim. We so order. We make a further order that the deposit be made within two weeks from date hereof.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Rithaudeen & Aziz.*

DIAMOND PEAK SDN. BHD. & ANOR. v. TWEEDIE

[F.C. (Raja Azlan Shah C.J., (Malaya), Chang Min Tat F.J. & Abdoolcader J.) December 4, 1979 & January 21, 1980]

[Penang — Federal Court Civil Appeal No. 44 of 1979]

Practice and Procedure — Action for specific performance of agreement for sale of land or damages — Application for summary judgment — Application dismissed by judge who also dismissed action — Whether judge has power to do so — Triable issues — Unconditional leave to defend should have been given — R.S.C. 1957, O. 14, O. 14A, rr. 1 and 4, O. 25 rr. 2 and 3, O. 30 r. 1(3).

Contract — Whether contract constituted by letters between parties — Acceptance conditional on formal contract being drawn up — Submission that correspondence did not contain all terms of contract — Failure to complete contract — Caveat entered against land.

In this case the appellants claimed specific performance of a contract for the sale of land which he claimed was embodied in an exchange of letters between the parties. The respondents had failed to complete the contract and the first appellant had lodged a caveat against the land. The respondents had applied for the removal of the caveat. The learned trial judge heard both applications and he allowed the respondent's application with costs and ordered the removal of the caveat, dismissed the appellant's application under Order 14A with costs and then went on to further order the dismissal of the appellant's action out of court with taxed costs. The appellants appealed.

Held: (1) the learned judge had no power in an application for summary judgment to dismiss the action. All that was open to him to do in regard to the appellant's application for summary judgment under Order 14A was to give the respondent unconditional leave to defend;

(2) it clearly appeared from the facts and the circumstances of this case that there were in fact highly triable issues in the matter and the learned judge should therefore have given the respondent unconditional leave to defend.

Cases referred to:-

(1) *Bigg & Anor.* v. *Boyd Gibbins Ltd.* [1971] 2 All E.R. 183, 184.

(2) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212; [1979] 3 W.L.R. 373.

(3) *Von-Hatzfeldt Wildenburg* v. *Alexander* [1912] 1 Ch. 284.

(4) *Lockett* v. *Norman-Wright* [1925] 1 Ch. 56.

(5) *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.

(6) *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294, 297.

(7) *Butler Machine Tool Co. Ltd.* v. *Ex-Cell-O Corporation (England) Ltd.* [1979] 1 W.L.R. 401, 405.

(8) *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha and Telegraph Works Company* (1875) L.R. 10 Ch. A. 515, 526.

HIGH COURT.

Lim Kean Chye (*Lim Cheng Chuan* with him) for the plaintiffs.

W.S.W. Davidson (*V. Thevendran* with him) for the defendant.

Cur. Adv. Vult.

Arulanandom J.: There are in this matter two applications before me. The first one (Encl. 10) was filed on July 28, 1978 by the defendants for an order pursuant to section 327 of the National Land Code for the removal of a Private Caveat Jil. No. 20 Fol. No. 11 dated April 8, 1978, on Lots 521, 514, 522 and 538 Mukim 2 D.B.D. Pulau Pinang lodged by the first plaintiffs in this suit. The second application (Encl. 12) was filed on July 31, 1978, by the plaintiffs for an order pursuant to Order 14A of the Rules of the Supreme Court for an Order for Specific Performance of the agreement in the writ in this action.

As the applications were inter-related in that the result of one would affect the other, I heard both applications together with the consent of counsel.

The plaintiffs' claim as set out in the indorsement of the writ is as follows: —

"(1) Specific performance of an agreement embodied in an exchange of letters between the second plaintiff and the defendant dated February 3, 1978 and February 6, 1978 respectively for the sale by the defendant to the plaintiffs of certain lands known as Holding Nos. 514, 521, 522 and 538 Mukim 2, situate in the South West District, Penang.

(2) In the alternative specific performance of the said agreement as varied by subsequent letters ending with the second plaintiff's solicitors' letter of May 5, 1978.

(3) Further and in the alternative damages for breach of contract.

(4) Further or other relief.

(5) Costs."

In reply to this the defendant in his affidavit denies that there was ever any concluded contract for the sale of his lands to the plaintiffs and that whatever negotiations there might have been were terminated when the plaintiff failed to comply with the terms of the defendant's solicitor's letter dated May 8, 1978.

The court must therefore in the first instance decide whether there is a triable issue. If there is, then, the plaintiffs' application for summary judgment will have to be dismissed and the defendant's application for removal of the caveat will have to be dismissed.